



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
FREEDOM OF INFORMATION ACT BRANCH
Washington, D.C. 20570

Via email

September 29, 2022

Re: FOIA Request NLRB-2022-001501

Dear Vickie Walp (Littler Mendelson PC):

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, received on July 7, 2022, in which you requested "any and all documents" in Case Nos. 04-CB-281439, 04-CA-288633, and 04-CB-293918. You assumed financial responsibility for the processing of your request in the amount of \$37.00.

We acknowledged your request on July 7, 2022. In an email to a member of the FOIA staff on July 14, 2022, you agreed to assume financial responsibility "for any and all fees" associated with the processing of your request. In a September 16, 2022 email, you further agreed to narrow the scope of your request to only the formal documents in Case No. 04-CB-293918, and in Case Nos. 04-CB-281439 and 04-CA-288633, you narrowed your request to the formal documents, any position statements and attachments or exhibits to position statements filed by the parties.

A search of the Agency's electronic casehandling system, NxGen, has been conducted. This search has located 354 pages of responsive, releasable records from the requested case files, which are attached.

Upon my review, redactions have been made to portions of these records to protect the privacy interests of individuals named in the records. These redactions were made pursuant to FOIA Exemption 6, which protects personally identifiable information, the release of which would constitute a clearly unwarranted invasion of personal privacy; FOIA Exemption 7(C), which protects records or information compiled for law enforcement purposes, the release of which could reasonably be expected to constitute an unwarranted invasion of personal privacy; and Exemption 7(D), which permits an agency to withhold information compiled for law enforcement purposes that "could reasonably be expected to disclose the identity of a confidential source . . .".
5 U.S.C. § 552(b)(6), (b)(7)(C) and (b)(7)(D).

Other investigatory records are being withheld in their entirety under FOIA Exemptions 6, 7(C), and 7(D) since their disclosure could constitute an unwarranted invasion of privacy and/or reveal a confidential source.

Exemption 6 permits agencies to withhold information about individuals in “personnel and medical and similar files” where the disclosure of the information “would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). *Am. Immigration Lawyers Ass’n v. Exec. Office for Immigration Review*, 830 F.3d 667, 673 (D.C. Cir. 2016). The “files” requirement covers all information that “applies to a particular individual.” *Ayuda, Inc. v. FTC*, 70 F.Supp.3d 247,264 (D.D.C. 2014) (citing *U.S. Dep’t of State v. Wash. Post Co.*, 456 U.S. 595, 601-02 (1982)). “‘Similar files’ has been interpreted broadly to include ‘[g]overnment records on an individual which can be identified as applying to that individual.’” *Pavement Coatings Technology Council v. United States Geological Survey*, 2019 WL 7037527, *8 (D.D.C. Dec. 19, 2019) (quoting *Wash. Post Co.*, 456 at 602). See *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 198-199 (D.C. Cir. 2006) (Exemption 6 may exempt not just files, but personal information such as names and addresses). Exemption 7(C) permits agencies to withhold information compiled for law enforcement purposes where disclosure of the information “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(7)(C); *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 756 (1989), see also *Brennan Center for Justice at New York University School of Law v. DOJ*, 2020 WL 1189091, *3-4, (D.D.C. Mar. 12, 2020) (reaffirming that Exemption 7(C) imposes a “lower bar for withholding” than Exemption 6).

Application of Exemptions 6 and 7(C) requires a two-part balancing test that considers: (1) whether there is a legitimate personal privacy interest in the requested information, and, if so; (2) whether there is a countervailing public interest in disclosure that outweighs the privacy interest. *Judicial Watch, Inc. v. Nat’l Archives & Records Admin.*, 214 F. Supp. 3d 43, 58 (D.D.C. 2016), *aff’d*, 876 F.3d 346 (D.C. Cir. 2017), citing *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171 (2004). With respect to the first factor, the Supreme Court has described Exemptions 6 and 7(C) as reflecting privacy interests in “avoiding disclosure of personal matters,” *Reporters Comm.*, 489 U.S. at 762, maintaining the “individual’s control of information concerning his or her person,” *id.* at 763, avoiding “disclosure of records containing personal details about private citizens,” *id.* at 766, and “keeping personal facts away from the public eye,” *id.* at 769. Consistent with these concerns, privacy interests have been recognized for individuals named in a law enforcement investigation, including third parties mentioned in investigatory files, as well as witnesses and informants who provide information during the course of an investigation. See *Rugiero v. U.S. Dep’t of Justice*, 257 F.3d 534, 552 (6th Cir. 2001); *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 894 (D.C. Cir. 1995); and *Van Bourg, Allen, Weinberg & Roger v. NLRB*, 751 F.2d 982, 985 (9th Cir. 1985). With respect to the second

factor, the public's interest in disclosure depends on "the extent to which disclosure would serve the 'core purpose of the FOIA,' which is 'contribut[ing] significantly to public understanding of the operations or activities of the government.'" *U.S. Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994) (emphasis in original), *quoting Reporters Comm.*, 489 U.S. at 775. As the Supreme Court further explained in *Nat'l Archives & Records Admin.*, 541 U.S. at 172, to defeat a privacy interest there must be some indication that the "public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake . . . [and that] the information is likely to advance that interest."

Applying the above balancing test, I have determined that the personal privacy interests at stake outweigh any public interest, and for this reason, the records are exempt from disclosure. The withheld records are investigative files created or obtained by the Agency for the purpose of enforcing the National Labor Relations Act, and contain individuals' names, addresses, and other identifying information that fit squarely within the types of privacy interests that Exemptions 6 and 7(C) were intended to protect from disclosure. By contrast, I perceive no countervailing public interest in disclosure. Absent a public interest that outweighs the private interests identified, the records are protected from disclosure under Exemptions 6 and 7(C) and are thus being withheld.

In addition to Exemptions 6 and 7(C), these records are withheld under Exemption 7(D). They contain information provided to the Agency under an express promise of confidentiality, and, accordingly, are exempt from disclosure. Exemption 7(D) permits an agency to withhold records or information compiled for law enforcement purposes that "could reasonably be expected to disclose the identity of a confidential source . . ." 5 U.S.C. § 552(b)(7)(D). A "source" is considered confidential if he or she "provided information under an express assurance of confidentiality or in circumstances from which such an assurance could reasonably be inferred." *See U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 172 (1993). Exemption 7(D) permits withholding any information furnished by a source that might disclose or point to his or her identity. *See Radowich v. U.S. Attorney, Dist. of Md.*, 658 F.2d 957, 960 n.10 (4th Cir. 1981).

One of the purposes underlying Exemption 7(D) is to "encourage cooperation with law enforcement agencies by enabling the agencies to keep their informants' identities confidential." *United Technologies Corp. v. NLRB*, 777 F.2d 90, 94 (2d Cir. 1985). This is "particularly important to agencies, such as the NLRB, . . . [which] must depend on the information provided by the charging party and its witnesses" who are often the "sole source of the Board's information in unfair labor practice cases." *Id.* ("An employee-informant's fear of employer retaliation can give rise to a justified expectation of confidentiality."). Significantly, a source's identity can be withheld under Exemption 7(D) even if his or her identity is or becomes known through other means. *See, e.g., Jones v. FBI*, 41 F.3d 238,

248-49 (6th Cir. 1994); *Ferguson v. F.B.I.*, 957 F.2d 1059, 1068-69 (2d Cir.1992) (Exemption 7(D) protection is available even if the source has testified at a hearing or the information provided by the source has otherwise been made public); *Lesar v. U.S. Dep't of Justice*, 636 F.2d 472, 491-92 (D.C. Cir. 1980); *Ortiz v. Dep't of Health and Human Serv.*, 70 F.3d 729, 733 (2d Cir. 1995); *United Technologies*, 777 F.2d at 95. Moreover, Exemption 7(D) protection is not diminished by the fact that a charging party may ultimately withdraw his or her claim, or if the investigation or case has been closed. *Ortiz*, 70 F.3d at 733.

Finally, please note that a number of pages in the records being released have colored boxes (black, white and/or yellow) obscuring the text underneath. These markings were in the original records and were not made by this office pursuant to the FOIA. Redactions made by the FOIA Branch appear as black boxes with a white overlay text stating the applicable FOIA exemption(s).

For the purpose of assessing fees, we have placed you in Category A, commercial use requester. This category refers to requests "from or on behalf of a person who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made, which can include furthering those interests through litigation." NLRB Rules and Regulations, 29 C.F.R. § 102.117(d)(1)(v). Consistent with this fee category, you "will be assessed charges to recover the full direct costs of searching for, reviewing for release, and duplicating the records sought." 29 C.F.R. § 102.117(d)(2)(ii)(A). Charges are \$9.25 per quarter-hour of professional time. 29 C.F.R. § 102.117(d)(2)(i).

Three hours of professional time was expended in reviewing for release the requested material. Accordingly, please remit \$111.00.

Payment Instructions: Due to the COVID-19 pandemic and resulting widespread employee telework at the Agency's Headquarters offices, we are no longer accepting checks or money orders as payment at this time. To submit payment for your FOIA request, please use www.pay.gov. From the www.pay.gov home page, scroll down to the bottom left corner to select "Pay a FOIA Request." Click "See all options" and go to "Filter By Agency" to check the box for the National Labor Relations Board. Continue following instructions on the website. Please remember to include the Invoice Number, which is the NLRB FOIA Case No., and the amount you intend to pay. Further, please be advised that all FOIA payments must be paid in full before any future FOIA requests are processed.

You may contact Timothy Bearese, the Attorney-Advisor who processed your request, at (202) 273-3752 or by email at Timothy.Bearese@nrlb.gov, as well as the Agency's FOIA Public Liaison, for any further assistance and/or to discuss any aspect of your request. The FOIA Public Liaison, in addition to the Attorney-Advisor, can further explain responsive and releasable agency records, suggest

agency offices that may have responsive records, and/or discuss how to narrow the scope of a request in order to minimize fees and processing times. The contact information for the FOIA Public Liaison is:

Kristine M. Minami
FOIA Public Liaison
National Labor Relations Board
1015 Half Street, S.E., 4th Floor
Washington, D.C. 20570
Email: FOIAPublicLiaison@nrlb.gov
Telephone: (202) 273-0902
Fax: (202) 273-FOIA (3642)

After first contacting the Agency, you may additionally contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA dispute resolution services it offers. The contact information for OGIS is:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, Maryland 20740-6001
Email: ogis@nara.gov
Telephone: (202) 741-5770
Toll free: (877) 684-6448
Fax: (202) 741-5769

You may obtain a review of this determination under the NLRB Rules and Regulations, 29 C.F.R. § 102.117(c)(2)(v), by filing an administrative appeal with the Division of Legal Counsel (DLC) through FOIAonline at: <https://foiaonline.gov/foiaonline/action/public/home> or by mail or email at:

Nancy E. Kessler Platt
Chief FOIA Officer
National Labor Relations Board
1015 Half Street, S.E., 4th Floor
Washington, D.C. 20570
Email: DLCFOIAAppeal@nrlb.gov

Any appeal must be postmarked or electronically submitted within 90 calendar days of the date of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Please be advised that contacting any Agency official (including the Attorney-Advisor, FOIA Officer, or the FOIA Public Liaison) and/or OGIS does not stop the

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90-day appeal clock and is not an alternative or substitute for filing an administrative appeal.

Sincerely,

/s/ Synta E. Keeling

Synta E. Keeling
FOIA Officer

Attachment: (354 pages)